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In The  
**Supreme Court of the United States**  
October Term, 1997

STATE OF ARIZONA ex rel.,  
Arizona Department of Revenue,  
*Petitioner,*  
vs.

BLAZE CONSTRUCTION COMPANY, INC.,  
*Respondent.*

On Writ Of Certiorari To The Arizona  
Court Of Appeals, Division One

**BRIEF OF THE NAVAJO NATION AS AMICUS CURIAE  
IN SUPPORT OF THE RESPONDENT**

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## QUESTION PRESENTED

Whether a State may impose a transaction privilege tax on a contractor who enters into contracts with the Bureau of Indian Affairs to construct and improve roads on an Indian reservation, where there is a comprehensive reservation road regulatory scheme with substantial involvement of the Indian nation.

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## INTEREST OF THE AMICUS CURIAE

This case concerns the State of Arizona's attempt to impose its transaction privilege tax on a contractor for services related to the construction of roads on behalf of the Bureau of Indian Affairs ("BIA"), an agency of the United States. The road projects are located entirely within the exterior boundaries of Indian reservations. The Arizona Court of Appeals held that the State's assessment of the transaction privilege tax on the contractor's gross proceeds from building roads for the Bureau of Indian Affairs on Indian reservations was preempted by the comprehensive federal Indian policies of promoting tribal self-sufficiency and economic development.

The Navajo Tribe of Indians (the Navajo Nation) is a federally recognized Indian tribe and is the largest such tribe in the United States, comprised of more than 200,000 members and occupying approximately 25,000 square miles of trust lands within the three states, Arizona, New Mexico and Utah.<sup>1</sup> The Navajo Nation government exercises governmental jurisdiction over the Navajo Nation. The Navajo Nation government provides a wide variety of governmental services throughout its jurisdiction. The State of Arizona's attempt to impose a transaction

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<sup>1</sup> Navajo Nation Division of Community Development, 1990 Census Population and Housing Characteristics of the Navajo Nation (1993).



privilege tax on respondent would interfere with the Navajo Nation's short and long range road plans.<sup>2</sup>

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### STATEMENT OF FACTS

The Navajo Tribe of Indians (the Navajo Nation) is a federally recognized Indian tribe and is the largest such tribe in the United States, comprised of more than 200,000 members and occupying approximately 25,000 square miles of trust lands within the three states, Arizona, New Mexico and Utah.<sup>3</sup> Approximately 69 percent of the land is utilized for grazing. The traditional style of sheep herding provided a stable lifestyle in the past, and continues to provide supplemental income for many tribal members. As a result, Navajo Nation members live sparsely across the Navajo Nation with an average density of 6.37 people per square mile.

The present Navajo government structure is a form of a three-branch government: the Executive Branch, the

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<sup>2</sup> The parties have consented to the filing of this brief by the Navajo Nation. The consents have been filed with the Clerk pursuant to Rule 37.3 of the Rules of the Court.

Pursuant to Rule 37.6 of the Rules of this Court, amicus states that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than amicus, has made a monetary contribution to the preparation or submission of this brief.

<sup>3</sup> Navajo Nation Division of Community Development, *1990 Census Population and Housing Characteristics of the Navajo Nation* (1993).

Legislative Branch, and the Judicial Branch. The Executive Branch includes the President of the Navajo Nation, the Vice President, and appointed officials overseeing 10 divisions and several offices. The Legislative Branch consists of the Speaker of the Council and the Navajo Nation Council comprised of 88 elected council delegates representing 110 chapters.<sup>4</sup> The Judicial Branch includes the Chief Justice and the Navajo Nation courts. Elections for the President and the delegates are held every four years in November.<sup>5</sup>

Navajo BIA Roads are constructed and approved pursuant to 23 U.S.C. §204. Funds for road construction and improvement on the Navajo Indian Reservation are appropriated in a lump sum for each fiscal year from the federal Highway Trust Fund. Transportation Equity Act §1101(a)(8), 112 Stat. 112. The funds available for Indian tribes are allocated based on a formula established by the Secretary of Interior pursuant to a negotiated rulemaking procedure with involvement of tribal representatives. Pursuant to regulation, the Commissioner of Indian Affairs has the responsibility to plan, survey, design and construct the Indian reservation roads. 25 C.F.R. §§170.2(d), 170.3, 170.4, 170.4(a). The Secretary of Transportation must approve the location, type, and design of all projects on the Navajo BIA Road System. 25 C.F.R. §170.4.

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<sup>4</sup> A chapter is a political subdivision of the Navajo Nation government. A chapter may be similar to a county in a state government setting.

<sup>5</sup> The Navajo Nation government is not engaged in any gaming enterprise.

Pursuant to Title 1 of the Indian Self-Determination and Educational Assistance Act, the Navajo Nation has entered into an intergovernmental agreement for the Transportation Planning of the Navajo BIA Reservation Road system. 25 U.S.C. §450, *et seq.* The Navajo BIA Road System consists of 6,184.2 miles of roads. State and county roads within the Navajo Nation account for approximately 3,197 miles of roads in the three state area in which the Navajo Nation is located.<sup>6</sup> The Navajo Nation is geographically divided into five agencies. The road projects are reviewed and recommended by five agency road committees.<sup>7</sup> These projects are usually derived from chapter requests. The Navajo Department of Transportation is an agency, of the Navajo Nation government, which oversees and coordinates road development on the Navajo Reservation. It participates in, approves and receives all information on reservation road planning and construction programs.

The Transportation and Community Development Committee of the Navajo Nation Council is the Navajo Nation legislative oversight committee for all road and transportation matters within the Navajo Nation. It gives final approval to all reservation road construction project lists, road plans and oversees the coordination of all

<sup>6</sup> Navajo Nation Department of Transportation, *Navajo Nation Long Range Comprehensive Transportation Plan*, ch. III (1998).

<sup>7</sup> The agency road committees are local Navajo transportation boards appointed by Navajo Agency delegation boards (comprised of district and chapter officials) as the local Navajo representatives.

transportation activities within the Navajo Nation. 2 NNC §§421, 423.<sup>8</sup>

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### SUMMARY OF ARGUMENT

This case involves the application of the Arizona transaction privilege tax to BIA road construction activities performed within Indian reservations located within the State of Arizona. The federal government has developed a comprehensive reservation road regulatory scheme.

This court has identified the relevant federal, tribal and state interests to be considered in determining whether a particular exercise of state authority violates federal law. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980). See also *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832, 837 (1982). The presence of this comprehensive reservation road regulatory scheme leaves no room for the additional burden sought to be imposed by the State of Arizona through its taxation of the gross receipts paid to Blaze Construction. *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832, 842. Like the State in *Ramah*, the State of Arizona simply has nothing to do with the reservation road construction activity it seeks to tax. *Ramah*, 458 U.S. at 843.

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<sup>8</sup> The Navajo Nation Code shall be cited as "NNC".



Thus, the state transaction privilege tax is unlawful and the decision of the Arizona Court of Appeals should be affirmed.

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### ARGUMENT

#### THE IMPOSITION OF THE ARIZONA TRANSACTION PRIVILEGE TAX INTERFERES WITH TRIBAL SELF GOVERNMENT.

There is an established policy of leaving Indians free from state jurisdiction in this country. *Rice v. Olson*, 324 U.S. 786, 789 (1945). This policy is based on the principle that Indian nations are distinct political communities which possess exclusive authority within the exterior boundaries of their territory. *Worcester v. Georgia*, 6 Pet. 515 (1832). As long as the tribal organization remains intact and recognized by the United States government as existing, a tribe is "distinct from others" separate from the jurisdiction of the state and to be governed exclusively by the government of the United States. *The Kansas Indians*, 5 Wall. 737, 755 (1867).

The Navajo Nation entered into a treaty with the federal government in 1868. In return for their promise to keep peace the treaty set aside for the use and occupation of the Navajo tribe of Indians a portion of what had been their native country. 15 Stat. 667, 668. This treaty should be interpreted under the rule that doubtful expressions are to be resolved in favor of the Navajo Nation. *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930). It would be logical to conclude that the Navajo treaty " . . . established the lands as within the exclusive sovereignty of the Navajos

under general federal supervision." *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 174-75 (1973). This is the same interpretation that was made to preclude the imposition of a state tax law on the Navajo reservation. See *Warren Trading Post Co. v. Arizona Tax Comm.*, 380 U.S. 685, 687, 690 (1965).

This court has identified the relevant federal, tribal and state interests to be considered in determining whether a particular exercise of state authority violates federal law. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980). See also *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832, 837 (1982). The federal and tribal interests arose from the broad power of Congress to regulate tribal affairs under the Indian Commerce Clause, Art. 1, §8 cl. 3, and from the semiautonomous status of Indian tribes. *White Mountain*, 448 U.S. at 145 (1980). The Court has referenced a number of congressional enactments revealing a strong and definite federal policy of promoting tribal self-sufficiency and economic development. As a result ambiguities in federal law should be construed generously to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence. *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 174-175 (1973).

In *White Mountain*, the federal government undertook comprehensive regulation of the harvesting and sale of tribal timber. The federal regulation scheme was found to be so pervasive that it precluded the imposition of the additional burdens of a relevant state tax. *White Mountain*, 448 U.S. at 148. The BIA was involved in virtually every aspect of the production and marketing of Indian

timber. The BIA established bidding procedures, set mandatory terms to be included in every contract and required all contracts be approved by the Secretary of Interior. *White Mountain*, 448 U.S. at 147.

In *Ramah*, the BIA possessed wide ranging monitoring and review authority. The BIA was required to conduct preliminary on site inspections, and prepare cost estimates for the project in cooperation with the Board. The Board was required to approve any architectural and engineering agreements. The BIA required certain terms to be included in the subcontracting agreements. The Board was required to maintain records for inspection by the Secretary of Interior. The Court held that direction by the federal government for the construction of Indian schools left no room for the additional burden sought to be imposed by the State of New Mexico through its taxation of the gross receipts of the construction contractor. *Ramah*, 458 U.S. at 842. The State of New Mexico was precluded from imposing an additional burden on the comprehensive federal scheme intended to provide this education – a scheme which has “left the State with no duties or responsibilities.” *Ramah*, 458 U.S. at 843.

The attempt by the State of Arizona to impose its transaction privilege tax on the reservation road contractor, in this case, simply cannot be reconciled with neither *White Mountain* nor *Ramah*. A regulatory scheme exists for the construction of Indian reservation roads similar to the detailed and comprehensive regulatory schemes that were present in *White Mountain* and *Ramah*. The regulatory scheme developed under 25 C.F.R. §170.3 sets out the planning, surveying, designing and construction phases of Indian reservation roads by the Commissioner of

Indian Affairs. The Secretary of Transportation is required to approve location, type and design of all Indian reservation road projects before any construction expenditures are made. 25 C.F.R. §170.4. Tribes shall establish annual priorities for road construction projects. 25 C.F.R. §170.4(a). The procedure for obtaining right-of-way is governed by part 169 of the regulations. 25 C.F.R. §170.5. The maintenance of Indian reservation roads is basically a local function. 25 C.F.R. §170.6. The Commissioner may enter into an agreement for tribal contributions. 25 C.F.R. §170.6(a). The Commissioner may enter into agreements with states for cooperation in the construction or maintenance of reservation roads and bridges. 25 C.F.R. §170.7. The Navajo Nation government is heavily implicated in the road planning and selection process. It is quite apparent that a comprehensive and detailed reservation road regulatory scheme is present.

The presence of this comprehensive regulatory scheme simply leaves no room for the additional burden sought to be imposed by the State of Arizona through its taxation of the gross receipts paid to Blaze Construction. *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832, 842. Like the State in *Ramah*, the State of Arizona simply has nothing to do with the reservation road construction activity it seeks to tax. *Ramah*, 458 U.S. at 843.

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## CONCLUSION

This Court has identified the relevant federal, tribal and state interests to be considered in determining whether a particular exercise of state authority violates



federal law. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980). See also *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832, 837 (1982). Neither *White Mountain* nor *Ramah* tolerate the attempt by the State of Arizona to impose its transaction privilege tax on the reservation road contractor. A regulatory scheme exists for the construction of Indian reservation roads similar to the detailed and comprehensive schemes that were present in *White Mountain* and *Ramah*. The Navajo Nation government is extensively involved in the reservation road scheme. The presence of this comprehensive regulatory scheme leaves no room for the additional burden sought to be imposed by the State of Arizona through its taxation of the gross receipts paid to Blaze Construction. *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832, 842. Like the State in *Ramah*, the State of Arizona simply has nothing to do with the reservation road construction activity it seeks to tax. *Ramah*, 458 U.S. at 843.

The state transaction privilege tax is clearly unlawful. The decision of the Arizona Court of Appeals should be affirmed.

Respectfully submitted,

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